120 (4)

No. 08-530

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BERETTA U.S.A. CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Of Counsel:

ERIC PROSHANSKY,
RICHARD COSTA, &
ALAN G. KRAMS

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, NY 10007
(212) 788-1010 or 1031

* *Counsel of Record*

Counsel for Petitioners

(Additional Counsel listed on signature page)

221114

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
REPLY ARGUMENT	1
A. Petitioners' Tenth Amendment Argument Is Preserved.	1
B. The Second Circuit's Misreading of this Court's Cases Regarding State Sovereignty Warrants Granting the Petition.	2
C. The Second Circuit's Interpretation of § 7903(5)(A)(iii) Violates this Court's "Plain Statement Rule."	4
CONCLUSION	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Alden v. Maine,
527 U.S. 406 (1999) 3, 4

City of Gary v. Smith & Wesson Corp.,
875 N.E.2d 422 (Ind. Ct.. App. 2007),
appeal denied, No. 45 A 05-0612-CV-00754,
2009 Ind. LEXIS 12 (Jan. 12, 2009) 5

City of N.Y. v. Beretta U.S.A. Corp.,
315 F. Supp. 2d 256 (E.D.N.Y. 2004) 2

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 2, 3

New York v. United States,
505 U.S. 144 (1992) 3

Statute:

Protection of Lawful Commerce in Arms Act,
§ 4(5)(A)(iii)
(codified at 15 U.S.C. § 7903(5)(A)(iii)) .... *passim*

Other Authorities:

Appellees' Reply Br., etc.,
No. 05-6942-cv (2d Cir. Sept. 19, 2006) 2

Br. of Appellees in Opp., etc.,
No. 05-6942-cv (2d Cir. July 6, 2006) 1

REPLY ARGUMENT

A. Petitioners' Tenth Amendment Argument Is Preserved.

Contrary to the Federal Government's assertion, Br. Fed. Resp. in Opp. 6 ("Gov't Br."), petitioners argued in the Second Circuit that § 4(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7903(5)(A)(iii), is unconstitutional because it dictates to states that they may regulate firearms only by legislation, not common law.

> Congress has, in the Act, provided that unless a state acts through its legislature to provide a cause of action, no party may obtain relief under otherwise-valid common law theories against firearms defendants. While not "commandeering" state officials in so many words, the Act powerfully interferes with the states' allocation of power between their legislative and judicial branches, contrary to the strictures of the Tenth Amendment.

Br. of Appellees' in Opp., etc., No. 05-6942-cv at 45 (2d Cir. July 6, 2006).

Petitioners reiterated this claim in their Second Circuit reply brief.

> In its main brief, the City pointed out that this language creates a serious federalism problem—it is a federal legislature telling courts that they cannot apply valid state law

> simply because that law was not enacted in statutory form by a state legislature, rather than allowing the state government to decide who makes the laws in its state.

Appellees' Reply Br., etc., No. 05-6942-cv at 21 (2d Cir. Sept. 19, 2006).

Nor is it accurate that petitioners' underlying claims are based only on New York's criminal nuisance statute and not its common law. Gov't Br. 6–7. This litigation predates the PLCAA. While petitioners have argued that their claims are preserved by § 7903(5)(A)(iii) because they come within § 240.45 of New York's Penal Law, petitioners pleaded both common-law and statutory public nuisance claims. *City of N.Y. v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 262 (E.D.N.Y. 2004) ("The City of New York sues manufacturers, importers and distributors of firearms for common law and statutory public nuisance."). Section 7903(5)(A)(iii) unconstitutionally purports to wipe out common-law claims solely because the actionable duties were defined by state courts rather than state legislatures.

B. The Second Circuit's Misreading of this Court's Cases Regarding State Sovereignty Warrants Granting the Petition.

Petitioners' Tenth Amendment claim is not at odds with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Gov't Br. 5; Br. in Opp. 9–11 ("Resps. Br."), which held that a law directly regulating wages and overtime pay under the Commerce Clause could be applied to "a governmental entity" as well as private employers. 469 U.S. at 537.

Respondents and the Government read far too much into *Garcia*. *See* Gov't Br. 5–6; Resps. Br. 9–10. The decision rejected ad hoc analyses of states' governmental functions as a basis for shielding them from congressional regulation of economic activity engaged in by the private and public sectors. However, post-*Garcia* decisions discussed in the petition show that this Court has not given Congress carte blanche to reorder states' core governmental processes, such as lawmaking, through the Commerce Clause. *See* Pet. 13–14 (discussing *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)); *id.* at 17–18 (discussing *Alden v. Maine*, 527 U.S. 706 (1999), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

Respondents miss petitioners' point when they argue that the petition should be denied "[b]ecause the City here does not dispute that the Commerce Clause authorized Congress to pass the PLCAA" (Resps. Br. 6). As petitioners explained, § 7903(5)(A)(iii) "is not standard economic regulation in which Congress defines legal duties regarding some aspect of interstate commerce." Pet. 15. Nor does the statute set a "single federal standard that governs what claims may and may not be brought against firearms manufacturers and sellers." Resps. Br. at 13. Section 7903(5)(A)(iii) is devoid of substantive content and does not regulate interstate commerce, governmental or otherwise. Instead, it improperly purports to "regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. 144, 166 (1992).

This Court's decision in *Alden v. Maine*, 527 U.S. 406 (1999), undermines the argument that *Garcia* disposes of this case and demonstrates that simply citing Congress's Commerce Clause authority does not "end the analysis." Resps. Br. 6. *Alden* explained that while Congress could use the Commerce Clause to subject states to federal overtime-pay standards, it could not compel state courts to entertain damages actions against states in derogation of their sovereign immunity. 527 U.S. at 712. *Alden* based this conclusion on the recognition that states still have sovereign authority to order their own governance, Pet. 17, and that reasoning cannot be discounted on the ground that the case did not "involve the Tenth Amendment." Resps. Br. 12. Deciding whether to set standards of conduct through common law or legislation is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today," notwithstanding Congress's authority under the Commerce Clause. *Alden*, 507 U.S. at 713.

C. The Second Circuit's Interpretation of § 7903(5)(A)(iii) Violates this Court's "Plain Statement Rule."

Respondents press their argument that § 7903(5)(A)(iii) prohibits all claims based on statutes not expressly applicable to firearms. Resps. Br. 15–16. However, the Second Circuit considered that interpretation, along with the plain language reading proffered by petitioners, and concluded that the law was ambiguous. App.34a. Respondents do not explain how it was consistent with the "plain statement rule" for the Second Circuit to construe an ambiguous statute in a

manner that interferes far more substantially with state governance than would be the case under the alternative reasonable construction.

In this regard, it is noteworthy that the Indiana Supreme Court recently declined to review *City of Gary v. Smith & Wesson Corp.*, 875 N.E.2d 422 (Ind. Ct.. App. 2007), *appeal denied*, No. 45 A 05-0612-CV-00754, 2009 Ind. LEXIS 12 (Jan. 12, 2009).[1] One Justice voted to hold the case in abeyance "pending resolution of litigation pending in the U.S. Supreme Court." Docket entry for 1/12/09, *available at* http://hats.courts.state.in.us/ISC3RUS/ISC2menu.jsp; then enter docket number. The Indiana Court of Appeals adopted the same construction of § 7903(5)(A)(iii) as the District Court and petitioners here.

> We cannot say that the word "applicable" in the predicate exception is ambiguous. On the face of the language, Indiana's public nuisance statute appears applicable to the sale or marketing of firearms. *See City of New York*, 401 F.Supp.2d at 261-264 (addressing the PLCAA and holding that the word "applicable" means "capable of being applied").

Smith & Wesson Corp., 875 N.E.2d at 432.

---

1. Respondents fault petitioners for bringing this case up in a reply brief, but petitioners avoided unfairly surprising opposing counsel by furnishing them with advance notice that the case would be mentioned in this brief rather than a separate supplemental brief (*see* Resps. Br. 7 n.1).

Of course the Second Circuit subsequently reached a different and mistaken conclusion, notwithstanding the "plain statement rule." It compounded this error by reading § 7903(5)(A)(iii) to preserve claims under generally applicable statutes previously construed by a state court as applicable to firearms even though the same claims will likely be disallowed when brought under a statute not yet authoritatively construed by a state court. Pet. 21–22; *cf.* App. 31a ("declin[ing] to foreclose the possibility that, under certain circumstances," a generally applicable statute not yet construed by a state court might be found applicable to firearms). This problem is not "hypothetical" because the New York statute at issue has not yet received an authoritative state construction. Resps. Br. 14. The Second Circuit's distinction highlights the illogic of reading an ambiguous law to eviscerate state courts' unquestioned role as the final interpreters of state legislation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel
of the City of New York
LEONARD J. KOERNER*
100 Church Street
New York, NY 10007
(212) 788-1010 or 1031

* *Counsel of Record*

ROBERT S. PECK
Center for Constitutional
Litigation, PC
777 6th Street N.W., Suite 520
Washington, D.C. 20001
(202) 944-2874

Counsel for Petitioners

Of Counsel:

ERIC PROSHANSKY,
RICHARD COSTA, &
ALAN G. KRAMS